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Salt Lake City v. Peggy Allred, aka Peggy Lovejoy, aka Thelma Allred : Brief of Defendant-Appellant In Reply To Petitlon For Rehearing of Respondent and Brief On Amicus In Support Thereof

IN THE SUPREME COURT
of the
STATE OF UTAH

SALT LAKE CITY, a municipal corporation,
Plaintiff and Respondent,

v.

PEGGY ALLRED, aka, PEGGY LOVEJOY, aka, THELMA ALLRED,
Defendant and Appellant.

Case No.
10752

BRIEF OF DEFENDANT-APPELLANT IN REPLY TO PETITION FOR REHEARING OF PLAINTIFF-RESPONDENT AND BRIEF OM AMICUS CURIAE IN SUPPORT THEREOF

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REPLY TO RESPONDENT'S BRIEF FOR REHEARING AND AMICUS CURIAE BRIEF

In response to the brief filed by Salt Lake City together with their petition for rehearing and the brief purported to be an amicus curiae brief, but reading with all the earmarks of advocacy, we desire to comment briefly on some of the cases cited in the briefs and to cite other cases apparently ignored by those seeking a rehearing.

American Fork v. Charliere, 43 Utah 231, 134 P. 739; *Salt Lake City v. Howe,* 37 Utah 170, 106 P. 705;

Annotated Cases 1912 C 189; *State v. Musser,* 118 Utah 537, 223 P. 2d. 193, were all cited by either the appellant or respondent in the initial briefs and have been heretofore considered by the court and add nothing to the present controversy.

L'Hote v. New Orleans, 177 U.S. 587, 20 Sup. Ct. 788, 44 L Ed 693, cited by the City is a case that was decided in 1900 on a petition by certain landowners to hold invalid an ordinance districting that city as to limits in which prostitutes could live and operate. No person purportng to be "any public prostitute or woman notoriously abandoned to lewdness" described in the contended ordinance was party to the suit.

The only fair import of the decision of the United States Supreme Court in affirming the Louisiana court is born in the court's concluding statement at 177 U.S. 600:

> "Under these circumstances we are of the opinion that the ordinance in question is not one of which the plaintiffs in error can complain."

Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d. 671 strongly relied on by the City as indicative of the law in Utah is a traffic case dealing with the validity of a City ordinance prohibiting driving under the influence of intoxicants. The City in their brief neglects to point out that the case is a rehearing of Salt Lake City v. Kusse[e] reported at 85 P.2d 802 where the lower court

was affirmed by a two-two decision with a strong dissent by Justice Larsen, concurred in by Justice Moffat, said dissent being incorporated in the opinion on rehearing at 93 P.2d. at page 675.

The City contends that the court's ruling applies only to Subsections 7 and 8 of the Salt Lake City Ordinance 32-2-1, of the Revised Ordinances of Salt Lake City, Utah 1965 (See the City's brief in support of rehearing page 13). However, the entire ordinance as evidenced by its caption refers to sexual intercourse for hire and lewd acts — and each subsection 1 through 7, with the possible exception of subsection 4 is integrated around "sexual intercourse for hire, lewd acts" or both. (Subsection 4 deals with "making a meretricious display") and subsection 8 specifically refers to and relates back to Sections 1 through 7 inclusive.

It would appear that the portions of the ordinance are not severable as all deal with the same subject matter and a partial invalidity must necessarily invalidate the entire ordinance. See McQuillin Municipal Corporations, 3rd Edition Vol. 6 at page 155, Section 20.64 states that the question as to whether or not a whole ordinance is invalidated by finding part to be invalid must be tested by the severability of the ordinance. Quoting at page 155:

> "It is essential however that the parts upheld form independently of the invalid portions, a complete law in some reasonable aspect so that it may fairly be concluded that the council would have enacted it without the invalid parts." (Citing cases at

footnote 89, page 155)

The same test indicates that a savings clause is not controlling but is only some evidence as to the intent of the legislature or council passing the law or ordinance.

It seems noteworthy at this point that this court speaking through Justice Crockett has already determined that a solicitation, proposition, or offer of sexual intercourse, whether male to female or female to male, does not even constitute an actionable tort in the State of Utah, let alone being a crime. See *Samms v. Eccles,* 11 Utah 2d 294, 358 P.2d 344, wherein it is stated:

> "The assumption is usually indulged that most solicitations occur under such conditions as to fall within the well known phrase of Chief Justice Magruder that 'there is no harm in asking' (Magruder, Mental and Emotional Disturbances in the Law of Torts, 49 Harvard Law Review 1033, 1055). The Supreme Court of Kentucky in Reed v. Maley pertinently observed that an action will not lie in favor of a woman against a man who without trespass or assault makes such a request; and the the reverse is also true; that a man would have no right of action against a woman for such a solicitation."

Can we find such an anomaly in the law that a factual situation that invades neither the right of the public or an individual such as to lay the basis for a tort my be tortured into a crime by a city commission or council when not expressly authorized by statutory legislation?

Directing the court's attention to the brief herein filed entitled "Brief of Amicus Curiae In Support of Respondent's Petition for Rehearing," Black's Law Dictionary, Fourth Edition, at page 107:

"AMICUS CURIAE. Lat. A friend of the court.

A by-stander (usually a counsellor) who interposes and volunteers information upon some matter of law in regard to which the judge is doubtful or mistaken, Fort Worth & D.C. Ry. Co. v. Greathouse, Tex.Civ. App., 41 S.W. 2d. 418, 422; or upon a matter of which the court may take judicial cognizance. The Claveresk, C.C.A.N.Y. 264 F. 276, 279; In re Perry, 83 Ind. App. 456, 148 N.E. 163, 165. Implies friendly intervention of counsel to remind court of legal matter which has escaped its notice, and regarding which it appears to be in danger of going wrong. Blanchard v. Boston & M.R., 86 N.H. 263, 167 A. 158, 160.

Also a person who has no right to appear in a suit but is allowed to introduce argument, authority or evidence to protect his interests. Ladue v. Goodhead, 181 Misc. 807, 44 N.Y.S.2d 783, 787."

It would seem that the term amicus curiae indicates an advisor to or friend of the court, not a position of advocacy. It will be noted that the brief, while purporting to be that of A. M. Ferro, of the Utah Municipal League, Eugene W. Hansen, of the Utah State Association of County Officials, and Ronald N. Boyce, of the Salt Lake County Bar Legal Services, Inc., was signed by Ronald N. Boyce, solely, who puts himself in a position of representing the Salt Lake County Bar Legal Services, Inc., an

Office of Economic Opportunity financed organization for indigents, who are in no way involved in, or affected by this litigation.

The "friend of the court" begins his discussion under the heading, Pre-Emption in Utah Law, at page 3 of his brief with the statement:

> "It is submitted that the concept of State pre-emption is alien to prior precedents from this court."

apparently ignoring the quotes from *Ogden City v. McLaughlin et al,* 5 Utah 387, 16 P. 721 (1888) at pages 9 and 10 of appellant's original brief herein, holding in effect that the compiled laws of Utah were controlling and Ogden City had no power to make an ordinance making it an offense to resort to a house of ill fame for lewdness.

Quoting from the McLaughlin case, supra,

> "Neither the charter of Ogden City (section 35), giving its power to restrain and punish prostitutes, nor Compiled Laws of Utah, page 697, section 9, giving power to the city to suppress or restrain bawdy and other disorderly houses, and punish the keepers thereof, authorizes an ordinance making it an offense to resort to a house of ill fame for lewdness.'

The court further stated:

> "It is a general rule that a municipal corporation has only such powers as are expressly granted or essential thereto, or plainly implied therein

> (again citing Dillon Municipal Corporation, Sections 89 and 91). And where there is a doubt as to the existence of the authority, such doubt is resolved against the corporation (again citing Dillon Municipal Corporation, Section 91)" (page 722)

The amicus curiae brief goes on at pages 10 and 11 to admit that the bulk of our sexual laws come from the territorial laws which were in effect at Statehood. *California City v. Pre-emption by Implication,* 17 Hastings Law Journal, 603 (1966) is quoted by the Amicus Curiae brief and contains an interesting and exhaustive collection of authorities upon the problem and citations of judicial rulings. However, the Amicus Curiae neglected to mention the case which is of primary importance therein. The same being *In ReCarol Lane* on habeas corpus, 22 Cal Reptr., 857, 372 P.2d. 897 (1962), wherein the Supreme Court of California on June 28, 1962, by a five-two decision vacated the opinion in 18 Cal. Rptr., 33, 367 P.2d. 673, and invalidated the ordinance under which Miss Lane had been charged with "resorting to a room for purposes of sexual intercourse," and holding at page 899:

> "The Penal Code sections covering the criminal aspects of sexual activity are so extensive in their scope that they clearly show an intention by the Legislature to adopt a general scheme for the regulation of this subject."

The opinion then cites the various sections of the California Penal Code referring to sexual activity in

any aspect. It should be noted that the Utah Code referring to sexual activity is even more extensive in its coverage than the California Code covering all aspects set forth in the Lane opinion and in addition thereto making fornication a crime.

In the Lane case there are 72 amicus curiae constituting the district attorney for each district in the State of California, several of the county attorney's offices, and many of the city attorney's offices from the principal municipalities in California. That case would appear to be on all fours with the case upon which rehearing is being presently sought ,to wit, Salt Lake City v. Allred, et al. The Lane case is charging the petitioner with resorting from her living room to her bedroom for the purpose of having sexual intercourse with a male not her husband. Citing from page 898 of 372 P.2d.:

> "(1) This is the sole question necessary for us to determine: Has the State adopted a general scheme for the regulation of the criminal aspects of sexual activity and determined, to the exclusion of local regulation, when sexual intercourse between persons not married to each other shall be criminal?
>
> Yes.
>
> (2) The Law: A local municipal ordinance is invalid if it attempts to impose additional requirements in a field that is preempted by the general law. (Cal.Const., art. XI § 11; Abbott v. City of Los Angeles, 53 Cal.2d 674, 682 3 Cal. Rptr. 158, 349 P.2d 974; Agnew v. City of Los

Angeles, 51 Cal. 2d. 1,5(2), 330 P.2d 385; Tolman v. Underhill, 39 Cal.2d 708, 712(4), 249 P.2d 280; Pipoly v. Benson, 20 Cal. 2d 366, 370(5), 125 P. 2d 482, 147 A.L.R. 515; Nat. Milk etc. Assn. v. City etc. of S. F., 20 Cal. 2d 101, 108(1), 124 P.2d 25.)

(3) Whenever the Legislature has seen fit to adopt a general scheme for the regulation of a particular subject, the entire control over whatever phases of the subject are covered by state legislation ceases as far as local legislation is concerned. (Pipoly v. Benson, supra, 20 Cal. 2d 366, 371, 125 P.2d 482, 147 A.L.R. 515.)

(4) In determining whether the Legislature intended to occupy a particular field to the exclusion of all local regulation we may look to the 'whole purpose and scope of the legislative scheme' and are not required to find such an intent solely in the language used in the statute. (Tolman v. Underhill, supra, 39 Cal. 2d at p. 712(6), 249 P.2d at p. 283; Abbott v. City of Los Angeles, supra, at pp. 682(9), 684, 3 Cal. Rptr. 158.)

The Salt Lake City Ordinance 32-2-1, Revised Ordinances of Salt Lake City, Utah 1965, goes far beyond the applicable and comprehenseive field of regulation of sexual activity by our State Law. Said ordinance makes it unlawful for any person, male or female (not limited to prostititutes or lewd persons): (1) to commit, or offer to commit, or agree to commit, a lewd act. 76-39-5 through 76-39-15 (76-39-1 to 76-39-4 Repealed) Laws of Utah 1965. An act of sexual intercourse for hire (no legislation applicable) or an act of moral perversion

(unintelligible, may refer to 76-53-22, Utah Code Annotated 1943); (2) Secure or offer another for a lewd act or act of sexual intercourse for hire, or of immoral perversion. (May come under 76-53-10 if lewd acts, sexual intercourse, for hire, or immoral perversion can be termed prostitution) under our courts definition thereof, but in any event preclude the guilt of a female person (Mrs. Allred) by the language of that act at lines 20-22 "with or for another male person;" (3) is above and beyond and in addition to any statutory prohibition; (4) language relative to but not contained in 76-39-5 through 76-39-15, Laws of Utah 1965; (5) may be contained in 76-53-8, if the acts set forth may be interpreted as prostitution under our courts definition;

(6) same as (5) supra; (7) comes under 76-53-10 but cannot refer to any person thereunder as a woman is excluded by the language of the statute; (8) Aiders and abetters, comes under 76-1-44, Utah Code Annotated, 1953, if the acts in (1) through (7) constitute crimes.

It is clear that the State law has pre-empted the field herein attempted to be controlled by the Salt Lake City Commission.

In the event the Court sees fit to grant a rehearing in the above entitled case, it is respectfully requsted that the Court consider Points II and III of appellant's initial brief, to-wit:

Point II—The Ordinance is so Vague and Am-

biguous as to be Unconstitutional

Point III—That the ordinance in question attempts to make crimes of acts which are not crimes under the laws of the State of Utah

These matters not having been discussed in the majority opinion on the basis of ruling on pre-emption.

CONCLUSION

It is urged that the court ignore the newspaper and television campaign regarding the above case in considering the petition for rehearing, and if rehearing is granted, that they consider all the points of validity and constitutionality of the ordinance attacked.

Respectfully submitted,

HATCH & McRAE